COMMENTS FROM THE PUBLIC ON FOREIGN POLICY-BASED EXPORT CONTROLS

Hardinge Inc.

United Technologies

Information Systems Technical Advisory Committee

International Business Machines Corporation

Nuclear Energy Institute

Boeing

Varian

Sun Microsystems

Regulations and Procedures Technical Advisory Committee

CC: Auto-ITAR

ESTABLISHED 1890

Hardinge Inc.

One Hardinge Drive, Elmira, NY 14902-1507

Robert E. Agan
Chairman of the Board
Chief Executive Officer

November 14, 1996

Ms. Maureen Tucker
Senior Policy Advisor
Room 3886C
Bureau of Export Administration
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Washington, DC 20230

Dear Ms. Tucker:

I am pleased to respond to Assistant Secretary Eckert's request of October 18, 1996 for PECSEA members' comments with regard to export administration and foreign policy controls. My comments are based on a review of the 1995 Export Administration Annual Report and 1996 Report on Foreign Policy Export Controls. As I have indicated in the past, my comments are a reflection of many years of experience in the machine tool industry both as President and Chairman of Hardinge Inc. and as an active member of AMT - The Association for Manufacturing Technology, including serving as its Chairman in 1992-93. This experience leads me to conclude that the most significant foreign policy controls for the machine tool industry are those dealing with Nuclear Non-Proliferation. While my comments will be principally directed toward these controls, I'm sure that elements of my discussion are relevant to other foreign policy controls as well.

I would like to repeat a comment which I made in a similar letter last year. In my opinion, foreign policy controls in general contain a major shortcoming. In most cases, regardless of the reasons for the initiative, foreign policy controls have a very high tendency to become unilateral. Certainly the history of these controls bears out this argument. And I see no reason why the future of such controls will be any different.

Turning to the area of nuclear controls, the experiences of my own company and those of my colleagues in the machine tool industry offer numerous, well documented examples

Phone 607-734-2281 Fax 607-734-2353

that the Nuclear Non-Proliferation Controls are subject to uneven enforcement, and as a result have failed in their intent to keep highly accurate machine tools from being installed in the nations which are the targets of those controls.

Nowhere is this more evident than in China. Hardinge has described several examples of uneven enforcement in the past, and similar situations continue to occur. Hardinge recently lost an order for multiple machines because a German competitor agreed to supply a Chinese manufacturer with machines well in excess of existing accuracy limits, while we felt compelled to offer only products within the parameters of those limits. In fact, at a recent large Chinese machine tool show, this same competitor openly displayed and offered for sale machines with published and advertised accuracies well beyond existing control limits. Photographs of our competitor's display and copies of its sales brochures were submitted for congressional record by Thomas T. Connelly, Hardinge Inc.'s Treasurer, to the Senate Subcommittee on International Finance at its July 31, 1996 hearing on HR 361, the Export Administration Act of 1996. Unfortunately, that legislation was not enacted by the 104th Congress. One major improvement in that bill was the unfair advantage provision, which finally acknowledged the inadequacy of the foreign availability language in existing legislation. This provision would have provided the opportunity for relief from the unfair advantage given our foreign competitors by their governments' lax interpretation of international export control regimes. I recognize that the Nuclear Non-Proliferation controls exclude any consideration of foreign availability. But I must continue to stress the unfair disadvantage caused by unequal enforcement of these controls, and I am compelled also to express my disappointment with congressional failure to enact meaningful export control reform legislation.

Assistant Secretary Eckert indicates in her letter of October 18 that a significant criterion for evaluating foreign policy controls is their effect on export performance of the United States in the international market, and in particular its reputation as a reliable supplier. I must repeat my statement of last year that the reputation of the United States machine tool industry for supplying machines which fall under Nuclear Non-Proliferation license requirements is severely damaged. Hardinge has been told this pointedly by Chinese customers, and there is ample evidence that indicates this to be true for other U.S. builders as well.

Not only is the U.S. government more stringent than others in enforcing Nuclear Non-Proliferation controls, it goes well beyond those limits in requiring licenses for items not on the nuclear list. One such example concerns Cincinnati Milacron, one of America's largest machine tool builders. In 1994, Cincinnati received a cable from the technical department manager of the Chengdu Aircraft Industrial Corporation. The cable declared that, because of Chengdu's difficulty in obtaining export licenses for American products; and because they have not encountered such difficulties with the Europeans and Japanese; no American machine tool builders were being invited to China for technical discussions and Chengdu would plan no visits to U.S. manufacturers. Insistence on rigid export

controls for items beyond the nuclear control list is a guarantee that U.S. machine tool builders will suffer unfair competition in the world marketplace

This year's report describes improvements in export control rules which have significantly reduced the numbers of required export licenses. This may very well be true for the country as a whole, but this is not the case for the machine tool industry. With regard to 1995 export licenses for China, for example, the dollar value of total license applications for all products decreased from 1994 by 74%. But when one looks more specifically at category 2B01 regarding numeric control units (for machine tools), we see an increase in the dollar value of 68%. More noteworthy, however, is the limited number of license applications in category 2B01 in both years, only 20 in 1994 and 19 in 1995. My company has simply stopped trying to sell highly accurate machine tools to Chinese customers, because numerous past license rejections have shown us that our government has no intention of allowing these sales. I suggest that the limited number of 2B01 license applications indicates that other U.S. machine tool builders have reached the same conclusion. I would also suggest that these numbers indicate that foreign customers, particularly in China, simply do not invite bids from U.S. machine tool builders, preferring suppliers whose governments provide a more lax interpretation of the rules and whose licensing processes are more prompt and responsive to specific proposals.

China has become the largest overseas consumer of U.S. produced machine tools. But, it is also true that U.S. machine tool sales to China have the highest potential of all machine tool exports to be affected adversely today and in the future by export controls. Therefore, it is with great interest and concern that our industry awaits further developments concerning export controls and their administration.

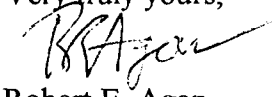
My company and indeed, the machine tool industry accepts the argument that, in highly unusual circumstances, when a country acts in a particularly egregious manner or exhibits conduct clearly of a threatening nature, foreign policy controls, whether unilateral or not, may be required. But we do believe that Nuclear Non-Proliferation Controls as they have been applied and enforced to date may not represent such a situation. Rather, those controls have rendered the U.S. machine tool industry an unreliable international supplier, while continuing to allow the shipment of supposedly controlled items from non-U.S. sources.

I would like to make one additional point regarding the 1995 Export Administration Annual Report. Page II-44 of the report discusses concern over the practice of "offsets" in military defense trade. The machine tool industry continues to be very concerned with this practice. Past experience has indicated that machine tools are a prime target for offset trade. I encourage you to take whatever steps are necessary to minimize the detrimental consequences of this practice to Hardinge and to the machine tool industry.

Thank you for providing me the opportunity to express my views on these subjects. I hope my comments will be constructively considered, and will be of significance in developing a framework both for reviewing the effectiveness of current controls and for creating new ones

I would be pleased to offer further input at any time.

Very truly yours,



Robert E. Agan
Chairman of the Board / CEO

UNITED TECHNOLOGIES

Suite 600
1401 Eye Street, N.W.
Washington, D.C. 20005
202/336-7400, 336-7403
Fax 202/336-7469

Marc S. Barthello, Jr.
Director, International Affairs

November 25, 1996

Ms. Sue Eckert
Assistant Secretary for Export Administration
U.S. Department of Commerce
Washington, D.C. 20230

Dear Ms. Eckert,

I am writing in response to your letter of October 18, 1996 requesting my views, as a member of the PECSEA, on the various foreign policy based export controls currently in effect at the Bureau of Export Administration.

I oppose unilateral economic sanctions - including those which take the form of foreign policy based export controls - as ineffective in achieving their stated objectives and for their damage to U.S. commercial interests. Unilateral export controls should be used only when there is clear evidence that the proposed sanction is enforceable, will achieve the intended foreign policy purpose, cannot be achieved through negotiations or other means, and is not counterproductive to other U.S. foreign policy interests. Such controls should not be used when the target country can obtain similar or identical items from sources other than the United States.

As you know, the President's Export Council has submitted to President Clinton a recommendation to appoint a government - industry panel to assess the current status of all economic sanctions, particularly those that are unilateral, and recommend policies to guide their use in the future. I strongly support that effort as a much more meaningful exercise than the current annual review of existing, entrenched foreign policy based export controls.

Thank you for soliciting my views.

Sincerely,

Marc S. Barthello

ISTAC

October 22, 1996

Mr. Iain Beard
Deputy Assistant Secretary for Export Administration
Bureau of Export Administration
US. Department of Commerce
Washington, DC 20230

Dear Mr. Baird,

Pursuant to your request at the recent ISTAC meeting, We offer the following comments on the effectiveness of unilateral controls.

The ISTAC takes the position that with the Wassenaar agreement there exits the potential for significantly different interpretations of the international agreement that can lead to different export controls.

The ISTAC discussed the current IRAN situation and DOC can confirm the dollar amount of computer shipments that US industry has not had an opportunity to compete for. While this market is closed to US companies, the products are sold by other countries showing how ineffective our unilateral controls are. These unilateral controls (without the agreement of other countries) only have the effect of precluding US companies from being able to compete in the marketplace.

It is difficult to imagine how unilateral controls can be effective for commodities for which the US is not the **sole** supplier.

Sincerely,

Norman D Cowder
Norman D. Cowder
ISTAC CO-Chair

John Edwards/DOC
John S. Edwards
ISTAC CO-Chair

cc: LE
JL
A.Mc

International Business Machines Corporation

Office of the CHQ Export Regulation Office

1301 K Street, N.W., Washington, D.C. 20005-3307

November 7, 1996

Reference: Ms. S.E. Eckert letter dated October 18, 1996

Ms. Maureen Tucker
Senior Policy Advisor
Bureau of Export Administration
U.S. Department of Commerce
14th and Constitution Ave. N.W.
Washington, D.C. 20230

Dear Ms. Tucker:

Foreign Policy Based Export Controls

Thank you for the opportunity to provide comment on foreign policy based export controls. While these controls have an effect on all businesses that have an international market, the IBM Company, as a multinational corporation, is affected in many ways. I will address my comments in the areas of OFAC controls, unfair impact and on unilateral controls in general.

The Treasury regulations prohibit certain financial and other dealings which in turn limit the delivery of any commodities, software or technology, directly or indirectly, to sanctioned countries and/or entities representing such countries. The goal of these embargo programs is to broadly deprive the target destination of all U.S. connected commerce, property, and trade. This reflects the historical origin of these measures as initially aimed at the economic isolation and destruction of an enemy, and later as a substitute for, or adjunct to, military action.

U.S. exporters have been consistently opposed to these types controls due to the negative economic impact on U.S. industry. Such controls may also lead to potential conflicts of law, where U.S. laws are in contention with foreign laws resulting in situations where the local company must choose to "break" one or the other country's legal requirements. Multinational companies have in fact been faced with prosecution in foreign courts and administrative tribunals for refusing to do business with a Cuban SDN. The U.K. and Canadian governments have gone so far as to pass legislation specifically prohibiting local companies from complying with unilateral laws issued by foreign governments, which are in conflict with their own internal policies. The extraterritorial reach of U.S. laws into third countries forces U.S. exporters into a no-win situation in terms of compliance.

Potential conflicts with foreign laws could be resolved by passing legislation which would introduce an escape clause in instances where U.S. laws are in conflict with those of a third

country (not the embargo target.) Examples would include those situations where the foreign laws favor trade with an embargoed country, or which prohibit local compliance with extraterritorial U.S. legal requirements. The clause would also recognize that compliance with the third country local law is a defense to "violating" the U.S. requirement for transactions in that third country. The U.S. government would then be required to seek multilateral cooperation with its foreign policy embargo if third country enforcement were desired.

Customers do take into consideration constraints imposed by the U.S. export regulations and despite interest in U.S. technology, they may well opt for a comparable offering from a foreign competitor. The extraterritorial reach of U.S. laws and regulations can and does impact the reputation of U.S. vendors as reliable suppliers.

The current Administration has recognized the importance of assessing the economic impact of export controls on U.S. trade. Although the Treasury regulations are primarily targeting asset controls, they do have a direct impact on U.S. trade. Therefore, prior to the imposition of trade sanctions, particularly when undertaking a unilateral action, an economic impact assessment should be done by the administration and included as part of the decision making process.

Relief from the burdens of unilateral controls have theoretically been available under the unfair impact provisions of the EAA. The current law governing foreign availability requires three findings:

1. That a product for which a foreign availability determination is sought is "available-in-fact" from sources outside the various multilateral control regimes.

2. That the product is available in "sufficient quantity" from these sources so as to render the purpose of controls meaningless.

3. That the product is available in "comparable quality" to the American product.

The regulatory process to make these assessments takes longer than the product innovation cycle in our industry today. By the time a positive foreign availability determination can be made, the products thereby subject to decontrol have already been rendered obsolete. In other words, American exporters must have already lost markets to foreign competitors before foreign availability determinations can result in control liberalization -- a bad formula in a market driven industry such as ours.

With few exceptions (the Clinton Administration announcements in the 1993 Trade Promotion Coordinating Committee report and the January 1996 computer controls changes), liberalization of computer export controls have failed to keep up with the speed of computer technology development and its rapid dissemination throughout the world.

A number of legislative attempts to address these and related issues have been attempted in the last three consecutive Congresses (none succeeded). Most prominently, industry has proposed to index controls to the pace of technology. However, indexing proposals have always encountered

stiff opposition from control advocates who argue against the "automaticity" inherent in such proposals (even though the proposals themselves clearly left room for executive discretion).

In the most recent attempts of the Clinton Administration to secure a reauthorization of the Export Administration Act (EAA), an innovative approach was proposed called the "Unfair Impact on United States Exporters" provision. In essence, this provision would allow exporters to petition for export control relief in three situations:

1. FOREIGN AVAILABILITY, INCLUDING ANTICIPATED FOREIGN AVAILABILITY --

   The same requirements would be imposed as cited above in terms of today's foreign availability law. However, the Administration proposal would permit the Administration's evaluation leading to final determinations to include the ANTICIPATED availability of a product in the near term. This would thereby permit American controls to be adjusted in a more timely manner, in light of expected product introductions in other countries. And, it would alleviate the situation under current law where foreign markets must be lost before adjustments in control levels due to foreign availability findings are affected.

2. INEFFECTIVE CONTROLS -- This would permit control liberalization to take place when petitioners can show that products are so widely available in the United States that export controls have been ineffective in blocking their dissemination to targeted countries. This would, for example, address the "Radio Shack computer" issue -- i.e., once products attain commodity-level status, they have reached a point at which they cannot be effectively controlled.

3. INCONSISTENT CONTROLS -- A petitioner could also seek relief on the grounds that the governments of other countries where there are sources of supply for products that compete with controlled U.S. products treat the export of these products less stringently than does the United States. This would, for example, help us a great deal in the post-COCOM era of "national discretion" licensing in our efforts to ensure that we operate on a level playing field vis-a-vis our competitors.

IBM believes this proposal represents a forward-looking innovation in public policy, and we support it. The unfair impact provision should help to focus the attention of American policy-makers on the breakneck speed that is so characteristic of our industry, thereby helping to ensure that U.S. industry remains competitive in the global marketplace.

Under the current Export Administration Act, the President is given broad discretionary authority under Section 6 of the act to impose unilateral export controls against other countries. Such Presidential discretion is an important tool needed in the execution of American foreign policy.

However, American exporters like IBM believe that this discretionary power has been used in recent years as the "weapon of first resort", rather than as the last resort. The impact of U.S.

foreign policy actions against other countries has therefore fallen unfairly on American exports and jobs.

We want to be clear: **WE ARE NOT CHALLENGING THE CONCEPT THAT THE PRESIDENT REQUIRES BROAD DISCRETION IN HIS FOREIGN POLICY-MAKING POWERS.**

What we are challenging however, is the practice whereby other means of protest against another country's actions are too quickly discarded and American exporters and workers are forced to pay for the unwise actions of another country.

Lack of multilateral consensus among the countries of the new Wassenaar Arrangement has reinforced the trend for United States to focus more on unilateral approaches to various trade and economic issues, which has drawn complaints from its allies. Over the last year, the EU in particular has complained about a seeming lack of U.S. commitment to the WTO's agenda. In addition, the EU, Canada and Mexico has strongly objected to the Cuban Liberty and Democratic Solidarity Act.

The United States has traditionally controlled dual-use technology in several ways. This has led to a clear tension between national security considerations supporting restrictions and the economic pressures from U.S. businesses, which argue that if goods will be freely available anyway, they should be able to supply them.

Under COCOM, this tension was muted because a U.S. veto of another country's exports both safeguarded U.S. national security prerogatives and ensured that U.S. producers would not suffer a competitive disadvantage. As the Wassenaar Arrangement allows no similar veto, the possibility exists that the U.S. will resort to unilateral controls more often.

The U.S. Government should strive for the imposition of multilateral controls, wherever possible. The embargoes of the Federal Republic of Yugoslavia and Iraq were imposed as a result of sanctions imposed by the United Nations. The success of multilateral control regimes has been recognized and should always remain the objective whenever imposing trade controls. U.S. unilateral controls serve only to harm U.S. trade.

Very truly yours,

Linda Evans

NUCLEAR ENERGY INSTITUTE

Marvin S. Fertel
VICE PRESIDENT,
NUCLEAR ECONOMICS &
FUEL SUPPLY

November 1, 1996

Patricia Muldonian
Regulatory Policy Division (Room 2096)
Office of Exporter Services
Bureau of Export Administration
U.S. Department of Commerce
P.O. Box 273
Washington, DC 20044

SUBJECT: Request for Comments on Effects of Foreign Policy-Based Export Controls (61 Fed. Reg. 192, et seq., October 2, 1996)

The Nuclear Energy Institute[1] (NEI) appreciates the opportunity to comment on the Bureau of Export Administration's (BXA) Foreign Policy-Based Export Controls in the Export Administration Regulations (61 Fed. Reg. 192, et seq., October 2, 1996.) NEI further appreciates the efforts of the BXA to solicit information regarding the experience of individual exporters in complying with proliferation controls as well as comments on the effects of foreign policy controls in its formulation of its export control policies. While NEI is not offering comments specific to the Export Administration Regulations, we have general comments concerning the overall effectiveness of the U.S. export control regime.

NEI believes that the utility of BXA's statutory requirement to annually review its implementation of foreign policy-based export controls legislation is limited by the fact that such controls are imposed under extensive additional authorities. Currently, U.S. export control laws are administered by the Departments of Commerce, Defense, Energy, State and Treasury and the Nuclear Regulatory Commission. Export controls are effected under so many separate pieces of

[1] The Nuclear Energy Institute is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's purpose is to foster and encourage the continued safe utilization and development of nuclear energy to meet the nation's energy, environmental and economic goals. NEI represents over 250 companies and organizations worldwide, including electric utilities that own and operate nuclear power plants, nuclear plant equipment suppliers, engineering/construction firms, nuclear fuel cycle companies, and others in the nuclear energy industry.

1776 I STREET, NW SUITE 400 WASHINGTON, DC 20006-3708 PHONE 202.739.8125 FAX 202.785.1898

legislation and regulations that it isn't possible to get a realistic sense of the impacts of the BXA controls except in the broader context.

Ensuring against the proliferation of nuclear weapons and weapons-related technologies is the major goal of U.S. nuclear-related export controls. This goal is fully supported by and its accomplishment is essential for a successful U.S. commercial nuclear industry. In this regard, NEI believes that the reconciliation of existing U.S. export control regimes could strengthen our nuclear nonproliferation regime and enhance economic and employment benefits to the United States while not imposing unnecessary restrictions on the U.S. commercial industry for exporting nuclear power-related commodities and technical data. Furthermore, the unilateral application of U.S. nonproliferation export controls to programs in which our allies are exporting nuclear-related commodities and technical data serves only to restrict U.S. commercial trade opportunities and does nothing to enforce the nonproliferation regime. As such, NEI encourages BXA to use this opportunity to initiate a broader-based multiagency review of nuclear export controls and to begin a rational and effective transition from a regime predicated on unilateral controls to a more effective one founded upon multilateral controls.

Thank you for the opportunity to comment. If you have any questions regarding these comments or would like additional information, please do not hesitate to contact me at (202) 739-8125.

Sincerely,

Marvin S. Fertel

Marvin S. Fertel

c: Ashton B. Carter (Department of Defense)
Lynn E. Davis (Department of State)
Anthony Lake (National Security Council)
Kenneth N. Luongo (Department of Energy)
Joan E. Spero (Department of State)
Carlton R. Stoiber (Nuclear Regulatory Commission)

Christopher W. Hansen
Corporate Vice President
Washington, D.C. Office

The Boeing Company
1700 North Moore Street
Arlington, VA 22209-1989

November 11, 1996

BOEING

Ms. Patricia Muldonian
Regulatory Policy Division (Room 2096)
Office of Exporter Services
Bureau of Export Administration
Department of Commerce, P.O. Box 273
Washington, DC 20044

Dear Ms. Muldonian:

I am writing on behalf of The Boeing Company, specifically the Boeing Commercial Airplane Group, in response to your request for comments on the effects of foreign policy-based export controls, published in the October 2nd. Federal Register. Although the export of US-manufactured civil aircraft and components to most countries in the world is now free of validated license requirements, exceptions cause us concern.

I am aware that the President's Export Council, the National Association of Manufacturers and the National Foreign Trade Council are taking up the issues posed by the growing use of unilateral economic sanctions by the United States in the pursuit of its foreign policy goals. I have also been made aware by Peter Little in this office that the Regulations and Procedures Technical Advisory Committee (RAPTAC), of which he is a member, will respond on behalf of all the Technical Advisory Committee's (TACs). I wish to associate Boeing with the thrust of the RAPTAC response and confine this letter to an issue of particular importance to our company in its global pursuit of civil aircraft sales.

The Boeing Company deplores acts of terrorism. The commercial jet transports we manufacture and sell to airlines worldwide, together with their passengers, have often been the targets of such acts. We believe that all governments must join in a cooperative effort against those who, whatever their nationality, resort to intimidation for political and religious motives.

We question though the effectiveness of unilateral US controls. It is incongruous that a US engine maker is able to obtain an export license

to provide its products to an airline of a terrorist-designated country, while the US aircraft manufacturer is often prevented from even supporting those old aircraft that predate sanctions, with certified parts and regular updates of safety items such as operational and maintenance manuals. These same airlines are able to acquire new equipment from foreign manufacturers powered either by US engines or engines outside of the control of the US Government.

In this way, not only are the reasons for the controls bypassed but passenger safety is compromised. No less important to the US manufacturer is the fact that sales and consequently jobs, are lost to our overseas competition which faces no comparable constraints.

BOEING

We earnestly request that all foreign policy controls be reviewed for their relevancy and effectiveness in today's global environment. From our standpoint, no useful purpose is served by continuing the implementation of export control practices that fail to achieve the foreign policy ends for which they were designed and which act to reduce US competitiveness.

Very truly yours,

Christopher W. Hansen

BOEING

Washington, D.C. Office
FAX LEADER

TO:		*FROM:*		*DATE:*
See below		**Peter Little**		11/15/96
(202) 482-2440	*(Phone)*	(703) 558-9650	*(Phone)*	
(202) 482-3355	*(Facsimile)*	(703) 558-3224	*(Facsimile)*	Number of pages 3 (including cover sheet)

Please contact this office at the above number if you do not receive complete fax.

Comments:

To: Patricia Muldonian
Regulatory Policy Division
Bureau of Export Administration
US Department of Commerce

Subject: Foreign Policy-Based Export Controls -- Request for Comment

Due to my absence from Washington for 2 plus weeks in October, I requested and obtained (from Anita McNamee) a deadline extension from November 1 to November 15 for a Boeing response to the Federal Register request for comment of October 2. Thank you for your flexibility -- I hope that this reaches you in time to be useful.

Regards,

Peter Little

P.S. Hard copy to follow.

October 31, 1996

varian

Ms. Patricia Muldonian
Regulatory Policy Division, Room 2096
Office of Exporter Services
Bureau of Export Administration
Department of Commerce
P.O. Box 273
Washington, DC 20044

RE: Request for Comments on Effects of Foreign Policy-Based Export Controls

Dear Ms. Muldonian:

We appreciate the opportunity to comment on the impact foreign policy export controls have on U.S. exporters. In summary, Varian believes that the U.S. government must: 1) drastically curtail its use of unilateral foreign policy export controls, and 2) limit controls to only those goods which make a material contribution to weapons proliferation.

Curtail use of Unilateral Foreign Policy controls

Numerous studies have repeatedly stated that unilateral export controls, i.e., controls placed without the concurrence of the major trading partners or supplier nations, almost always fail to achieve their intended result. While lofty on paper, they do not deter customers overseas from obtaining needed (and desired) goods and services. The trade embargo against Iran is probably the most glaring example of late which proves that the practice of trying to secure multilateral agreement, after the fact, has been largely ineffective. When the embargo against Iran was imposed a year and a half ago, the Administration emphatically stated it would actively encourage other countries to follow suit. But, because most Europe is very dependent on Iranian oil, it is no wonder that not a single European nation (or any other country for that matter) has imposed a similar embargo.

Limit controls to items which make a Material Contribution

Controls should only be placed on items which make a material contribution to weapons development; the catch-all provision of the Enhanced Proliferation Control Initiative (EPCI) should be eliminated.

While we strongly concur with the U.S. government that items which clearly assist in weapons development should not be sold to sensitive end-users in countries of concern, we are concerned that restrictions are placed, due to EPCI, on a wide range of benign items. The only items which should be controlled are those which have been multi-

Varian Associates, Inc. 3045 Hanover Street Palo Alto, California 94304-1129 U.S.A.
415/493-4000

laterally agreed to by one of the four export control regimes, i.e., the Wassenaar Arrangement, the MTCR, the NSG and the Australia Group. Items *not* found on any of these four control lists do not, by definition, make a material contribution to any weapons development activity. Therefore, these items should be not restricted from export.

Our company seems to have permanently lost a long-standing customer in India due to the U.S. government's over-reaching interpretation of the EPCI rules. Shimazdu, a Japanese manufacturer of analytical instruments, has "taken over this account" and is supplying all required equipment. It is distressing to note that the U.S. government has apparently not even attempted to ask the Japanese government to stop Shimazdu from making sales to this end-user. The reason, of course, is because *there are no controls* on low-level, basic laboratory equipment such as gas chromatographs. In the meantime, Varian has lost at least one million dollars in sales revenue to Shimazdu. This Japanese company is now penetrating the Indian market for analytical instruments whereas it did not even have a toe in this market just a few years ago.

U.S. policy makers need to remember that by denying a particular export to a U.S. exporter, it is often not just a single sale which is lost. Many times, the lost opportunity of a single sale permits other foreign competitors to enter a market which was previously closed to them. The end result is far greater than the loss of the single transaction.

Conclusion

Many decisions made to further the US's foreign policy goals fail to balance the economic impact on vital American industries. The U.S. government needs to work harder to limits its own use of foreign policy measures which are unilateral in nature.

Sincerely,

Carol Henton

Carol Henton
Manager, Export Administration

forplycm.doc

Sun Microsystems, Inc.
Legal Department
2550 Garcia Avenue, MS UPAL1-521
Mountain View, CA 94043-1100
415 960-1300
415 336-0530 fax

November 1, 1996

Ms. Patricia Muldonian
Regulatory Policy Division, Room 2096
Office of Exporter Services
Bureau of Export Administration
U.S. Department of Commerce
Fourteenth Street and Constitution Avenue, N.W.
Washington, D.C. 20230

By Hand

Re: Comments on Effects of Foreign Policy-Based Export Controls

Dear Ms. Muldonian:

On behalf of Sun Microsystems, Inc., in response to the Request for Comments that your agency published in 61 Federal Register 51395 (Oct. 2, 1996), I am submitting the following suggestions on how existing foreign policy-based export controls have affected exporters and whether they should be modified or rescinded. We are commenting on three areas: (1) the so-called "Catch-All" Rules of the Enhanced Proliferation Control Initiative ("EPCI"), (2) controls on high performance computers, and (3) unilateral controls generally.

CONSIDERATION IN 1996 REPORT APPRECIATED, BUT INSUFFICIENT

By letter of October 30, 1995, we submitted detailed comments last year on the foreign policy based export controls, targeting the EPCI Catch-All Rules because the Administration's efforts to fulfill a 1993 pledge to refocus those controls had been delayed by other priority efforts (as was a similar pledge made in 1990 by the Bush Administration). While we do appreciate that the Commerce Department's Bureau of Export Administration ("BXA") cited Sun's comments in an appendix to the annual Foreign Policy Report prepared with the consultation of the State Department and delivered to Congress in January 1996, we were very disappointed that the body of that report by Commerce and State did not actually address any of the points that we raised. Nor have they been addressed by BXA or State otherwise. Likewise, the Report failed to perform any of the promised analysis of the Catch-All controls required by Section 6(f) of the Export Administration Act separately from that of the more focussed components of the EPCI controls that are targeted to specific items; any semblance of analysis was of the nonproliferation controls as a whole. We therefore reiterate many of these points as worthy of your attention in trying to fulfill your obligation to assess the impact of these controls on industry and their effectiveness in accomplishing their intended purpose. Having had a year now to consider them, we are hopeful that the Report will at least address and answer these points this year.

We truly hope that you will address the points we are making in the Report, and we also hope that the Administration will take appropriate action to revise the controls based on your analysis. Each year, BXA solicits comments on foreign policy controls and high level officials make public statements that they will conduct a serious and detailed analysis this time, but each year the Reports go through the motions and simply extend all of the controls without change. Any serious analysis that may be done by the Economic Analysis Division of BXA (and its predecessors) of the real harm that unilateral foreign policy sanctions do to U.S. businesses and the U.S. economy (as compared with the elusive perceived benefits of these foreign policy controls) has not appeared in the Reports. We believe that a serious analysis in the 1997 Report would help to resolve an apparent long-standing impasse in interagency attempts to refine these controls and make them more targeted, workable, and better able to achieve their intended purposes.

EXECUTIVE SUMMARY

For reasons discussed below, we recommend the following:

EPCI Catch-All Controls

- Abolish the Catch-All Rule as unnecessary, given that the ability to inform exporters that an Exception to License item may not be exported to a particular sensitive destination resolves the single case ever cited to justify the broader rule (the Consarc furnace shipment destined for Iraq under General License, which was stopped and which could be stopped again with only the authority of the "is informed" rule of EPCI).

- If abolition is not feasible, apply the same disciplines and time lines to end-user check requests as are applied to license applications, so that well intentioned exporters are not left in limbo for months by interagency paralysis that leaves BXA unable to respond.

- "Inform" all exporters if one is informed by publishing the information, at least as a red-flag warning. There is no justification for the fact that U.S. competitors of Sun can and do sell like equipment to the same parties to which Sun has been informed it cannot sell.

- Grant exporters the same authority as U.S. licensing officers to make an export of an otherwise non-controlled item if they do not know the item will make a "material contribution" to proliferation activities.

- Publish the Department of Energy's list of "known" sensitive nuclear facilities and unsafeguarded facilities (rather than subject all exporters to potential liability without providing information that is readily available to the government but not the exporter).

- Narrow the nuclear Catch-All controls to apply only to the sensitive nuclear countries listed in Country Group D:2 (Supp. 1 to EAR Part 740) instead of the current much broader list that includes mostly countries of no such concern.

- Analyze the three Catch-All rules standing alone by the criteria of Section 6(f) of the Export Administration Act (which you republished in your request for comments describing how you would be analyzing current controls). Such analysis would help determine whether and to what extent these controls are actually accomplishing their intended purpose or, as we suspect, simply cost U.S. taxpayers millions of dollars without much useful effect. In this regard, your office should ask how many enforcement cases have there been since 1991 applying the Catch-All Rule, are there any cases where the "is informed" process would not suffice to address the problem, how many "is informed" letters have been issued and are outstanding, and other pertinent data that are available to BXA.

Conducting a serious analysis as described in your request for comments would provide a rational basis either (1) for continuing controls in effect, instead of simply going through the motions and doing so, or more likely (2) for modifying current controls to made them truly effective in achieving their intended purpose, and to rescind those that are ineffective or cause more harm than good.

High Performance Computer Controls

- Commence review of thresholds as announced October 6, 1995 before they become obsolete, as workstation servers (and soon workstations) are already surpassing those levels.

- Complete and publish in time for implementation before December 31, 1996 the revisions to the EAR Rewrite of May 25, 1995, which did not incorporate fully the high performance computer revisions.

- Review and revise controls on related components, which are in many areas unnecessary.

Unilateral Controls

Eliminate them or perform the analysis to justify them as promised in the TPCC Report of September 1993 and subsequently, rather than simply converting old multilateral controls that are superseded into unilateral controls and just extending them year after year.

DETAILED DISCUSSION

Proliferation Controls, Specifically the "Catch-All Rules"

We note in particular that the Request for Comments once again stated:

> BXA is particularly interested in the experience of individual exporters in complying with the proliferation controls, with emphasis on economic impact and

specific instances of business lost to foreign competitors. BXA is also interested in comments relating to the effects of foreign policy controls on exports of replacement and other parts.

We and other U.S. exporters have had particular difficulty in complying with the Enhanced Proliferation Control Initiative ("EPCI") regulations that, since 1991, have imposed the so-called "catch-all" controls on exports of items otherwise eligible for general license shipment if they could be used for certain missile technology, chemical and biological weapons, or nuclear end-uses or end-users. Providing clean economic data is very difficult given that these rules are so vague and the standards for compliance so unclear. We can offer the following points.

- The catch-all rules are unacceptably vague and provide no clear method for acceptable compliance that fits with modern methods of doing business. **We recommend that these Catch-All Rules be abolished.** No one has ever pointed out a real case since 1991 that could not be handled with the "is informed" portion of the EPCI rules. If abolition remains politically unfeasible despite the fact that the rule cannot be justified by an economic analysis, we have several other constructive suggestions.

- The bulk of our extensive export compliance system is now devoted to compliance with the EPCI catch-all clauses.

- **BXA and reviewing agencies must develop an orderly mechanism for processing and responding to industry requests for end-user checks on general license exports.** The White House Fact Sheet published with the President's Supercomputer announcement of October 6th specifically stated that "Exporters will be advised to contact the Department of Commerce if they have any concern with the identity or activities of the end-users." The current "system" for responding to such end-user inquires remains broken. In the view of most of industry who have tried it, it is frankly fairly useless.

    - As suggested for several years by BXA representatives, we have from time to time asked BXA for guidance and help when we have had questions about specific end-users based on published reports, yet did not have specific knowledge that our proposed exports be used for illegal proliferation end-uses. We have received very little helpful guidance in response to these requests. In some cases, we have been informed not to make sales to the entities in question, but other U.S. competitors who were not so informed sold comparable U.S. products to the same entities. The advice we received did nothing to the foreign company, it only took a sale away from us and gave it to a competitor who was not as diligent. In another case, we never received a response at all for over six months despite repeated requests. We attempted to consult directly with appropriate State Department officials when given to understand that BXA was waiting for State's response, but were told they had no record of our request. We specifically know that, in some cases, U.S. competitors who did not make such end-use/end-user requests were able to make

sales of comparable products to the same end-users that we had been informed not to sell to.[1]

- We have clearly lost sales either after we have been informed not to make a sale, or while waiting on BXA guidance knowing that both U.S. and foreign competitors are selling similar products to the same end-users.[2] Please understand, Sun Microsystems has a conservative export compliance program and willingly forgoes sales when it knows they will constitute materially to credible threats to world stability. What we object to is losing sales when the customer is receiving similar equipment anyway and there is no clear threat.

- **We propose that the U.S. Government apply the same disciplined licensing procedures to these end-user requests, including specifically the time limits and the default to decision process for escalation of cases where there is a difference of opinion. These are cases for which a license is not necessarily required. If the U.S. Government for legitimate reasons decides not to inform an exporter that it should not make a sale, the Government should free the company to make the sale. Otherwise, inform both us and our competitors that it should not be made. Any decision in this area is better than no decision. It is terrible export control policy to place companies under the obligation to make such decisions at the risk of liability when U.S. Government experts cannot make them.**

- The Government's standard for determining whether to issue a license under the "EPCI" catch-all rules is whether the items would make a "material contribution" to the

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We recognize that BXA must consult with other agencies on such requests and is often unable to provide a response because it would compromise sources and methods of intelligence gathering, for diplomatic reasons, or because the other agencies simply cannot agree. While we understand that at times BXA's hands may be tied in this area, the failure of the U.S. Government to respond to its citizens after imposing such an obligation and potential liability on them is not an appropriate way to regulate exports. Likewise, this cannot excuse informing our company but not informing other U.S. competitors.

While we cannot provide specific economic data in this short time period, we reference as we did last year several excellent studies that have demonstrated how transaction costs, administrative costs, and opportunity costs of export controls far exceed the costs of lost sales. E.g., Center for Strategic and International Studies, Breaking Down the Barricades: Reforming Export Controls to Increase U.S. Competitiveness, Chapter 4 "The Costs of Export Controls" (1994); Council on Competitiveness, Economic Security: The Dollar$ and Sense of U.S. Foreign Policy (1994); J. David Richardson, Sizing Up U.S. Export Disincentives (Institute for International Economics, 1993).

proliferation activities in question. **Exporters should be granted the authority to make a decision to export if they do not know that an item will make a material contribution.** We are often in a much better position to make that determination than are government sources. And, if the U.S. Government will not assist us in our compliance efforts by publishing the names of known proliferators, exporters should be given greater tools and ability to make their own decisions.

- President Clinton specifically stated in the announcement on Supercomputer controls on October 6th that the U.S. Government was "developing additional measures to inform exporters of their obligations and other security risks." This information has been promised since the EPCI rules were first implemented in 1991, but the U.S. Government has never delivered. Private entities have filled the void left by these unfulfilled promises by publishing disparate lists of allegedly "bad" end-users. U.S. officials have commented unfavorably on some of these private lists, but we have no idea what information in them is valid and what is invalid. More important, we have no comfort as to what standard export enforcement officials, armed with accurate knowledge after a real problem arises, will apply to our exports, which we must make based on much less clear facts.

  - **We propose that BXA publish the "is informed" list of individuals and at least suggest that they be considered suspect and to be red flags that deserve further investigation because of prior activities of concern.** If the U.S. Government is not willing to share this information for reasons of diplomacy, it should not apply the Catch-All rules to hold exporters potentially liable for making sales of decontrolled items to these entities.

  - We further request that the Department of Energy publish the list that it has of known unsafeguarded nuclear entities to which we cannot sell any products per EAR § 744.2(a)(2). It is not helpful to subject exporters to potential liability for such sales but not to provide the tools that would help avoid such liability. **At one point, the Department of Energy provided, and Commerce published, a list of known sensitive nuclear facilities. This list was helpful and should be republished. At minimum, the new Catch-All controls on unsafeguarded facilities require the Government to publish a list to tell exporters what known facilities are not subject to safeguards.**

- Although the European Union and Japan have adopted what appears to be a similar Catch-All Rule, our survey of leading EU Member export control authorities indicate that they are applying it quite narrowly. For them, as for the U.S. Government, it sounds and feels like a good rule, but is exceedingly difficult to apply. One EU export control regulatory official has said that none of the EU Member States wants to be the first to implement the EU Catch-All Rule because they would put their citizens at a competitive disadvantage vis-a-vis member states just as the United States has done with its citizens.

- The EPCI rules should be narrowed to countries of true concern in this area. Current controls are overly broad. In particular, the restrictions on certain nuclear end-users and end-uses set out in EAR § 744.2 should only apply to countries listed in Country Group D:2 (in Supp. 1 to EAR Part 740), consistent with the CBW and missile technology controls. The target country lists for the latter two controls (D:3 and D:4) should also be narrowed to countries of legitimate concern in this area. The nuclear controls apply to countries that no U.S. official believes to be a nuclear concern. (Some concern has been raised that the country list should be broad due to diversion concerns, but knowledge of likely diversions of an export to any destination to a prohibited end-user or use in a prohibited destination would be a violation of Prohibition 10 in EAR § 736.2(b)(10). Thus, this is not a legitimate reason not to narrow the list of targeted destinations to those of concern.) Narrowing the list to destinations of true concern would enable exporters to concentrate their attention on those exports that truly matter and make the controls more effective. It would also promote efforts of some in those destinations to bring their policies into line to avoid problems from being labeled as a destination of concern.

- There is a myth formed by repetition among government officials that the older nuclear catch-all controls have never been a problem for exporters. They have been and still are. They are just as vague, uncertain, and difficult to apply. We have never been able to receive clear guidance on what to do with an export to a nuclear utility or a university with a nuclear physics department.

Finally, we specifically recommend that BXA perform the analysis of the three Catch-All Controls required by Section 6(f) of the Export Administration Act separately from your analysis of the controls imposed on listed controlled items for nuclear, missile technology, and chemical and biological weapons purposes. The latter are largely multilateral, can be complied with much more easily. The list based controls are of much clearer benefit and effectiveness in achieving their intended purpose. Burying the analysis of the Catch-All Rules within that of the list based controls has been a method that allows this Report to avoid the hard analysis as to whether these controls are worth the candle. The Catch-All Rules are implemented only in and by the United States. We believe that these Catch-All Rules will fail any reasonable analysis of effectiveness. They were put in place because of one case during the Iraq invasion of Kuwait, when a single company wanted to export items under General License that the U.S. Government felt would contribute to nuclear and missile proliferation risks. The "is informed" rule that allows the U.S. Government to stop such an export corrects that problem and most other reported problems. No one has ever explained the need for a Catch-All rule with specific cases and facts, only theory. In contrast, industry's costs of compliance are reality. At minimum, such a rigorous, separate analysis of the Catch-All Rules will provide better data for decision-makers on:

- the purpose of the Catch-All rules;
- EU Catch-All Rule because they would put their citizens at a competitive disadvantage vis-a-vis member states just as the United States has done with its citizens.

- the economic impact on U.S. industry;
- how many applications for otherwise general license eligible shipments have been received, and of those, how many have been approved, denied, or held in limbo, respectively; and
- the extent to which the Catch-All Rules have been enforced and are enforceable.

BXA should now have at least five years of data on the EPCI Catch-All Rules and far more on the nuclear rules. If as we suspect there have been at most a few cases where uncontrolled items were determined to make a material contribution to proliferation end-uses, but the Catch-All Rules are costing U.S. industry millions of dollars and thousands of jobs without achieving their intended purpose, that data should provide a solid basis for change. If the data is otherwise, published analysis at least will help to make these rules more credible.

High Performance Computer Controls

On October 6, 1995, President Clinton announced the intention of the Administration to lift export controls on high performance computers to thresholds of 2,000, 7,000, and 10,000 MTOPS for given destinations. BXA's implemented that decision by regulations issued effective January 22, 1996 was just in time, as our company's workstation servers exceeded the old 1500 MTOP definition of a "supercomputer" early this year, as did those of many competitors. As announced last October, this policy was only expected to be effective for 18 months. That window is closing even faster, as many of our current workstation servers already exceed each of these levels, and next generation workstation servers and workstations will far exceed them. As we remarked last year, while Sun spends a tremendous amount of time and resources to comply with U.S. export controls, current high performance computer safeguards would be virtually impossible, and certainly economically unfeasible, to impose on such commodity products. Accordingly, it is necessary to commence review of the thresholds now rather than wait until we are again desperate.

In addition, the EAR Rewrite issued May 25, 1996, did not effectively incorporate the changes in controls. We urgently need BXA to issue its planned revision well in advance of the December 31, 1996 expiration of the Old Version EAR so that we and other computer companies can revise our compliance programs and maintain shipments of products that are eligible for General License shipment under the Old EAR but not under the New EAR (i.e., computers with CTPs between 260 and 2,000 MTOPS and graphics processors between the 3 and 10 million vector rates).

Finally, we note that many export controls remain in place on lower level components for computers and workstations that require costly and burdensome compliance programs. Microprocessors that are the essential component of such computers remain controlled at a CTP level of only **80** MTOPS, a control that is much more difficult if not impossible for BXA to police

effectively given the proliferation of PC microprocessors, as well as RISC products, operating well above those levels even on home computers. Likewise, certain other components, software with strong encryption capabilities, and related technologies remain tightly controlled. If a company cannot supply on a timely basis the necessary components to service products that are to be freed up from export controls, the changes in controls over the end-products will be severely undercut.

We again propose that the Administration apply the analysis that it conducted on high performance computer controls over the past year to these related components and other items. There has been no systematic review of the Commerce Control List entries (at least the old "national security" based controls) since COCOM expired at the end of March 1995, and there does not appear to be a new review mechanism underway.

Unilateral Controls Generally

In Chapter 5 of its seminal Report by the Trade Promotion Coordinating Committee, Toward a National Export Strategy (September 30, 1993), the Clinton Administration explicitly recognized that multilateral export controls are the best way to achieve U.S. objectives, and stated:

> The United States will avoid unilateral export controls and policies except when dictated by overriding national interests.
>
> * * *
>
> By December 31, 1993, the Administration will eliminate unilateral obstacles and controls, unless their continuation is essential to overriding national interests or is required by statute.
>
> Unilateral controls and policies also will be subject to annual review.

Id. at 56-57. We are still waiting to see this plan implemented three years later. In the meantime, the United States has issued new unilateral controls on exports to Cuba, Iran, and Libya, and has made little change in other unilateral controls, which dominate current U.S. export controls. Each time that multilateral controls are adopted, the U.S. places into unilateral controls on some countries those that would have expired. The ECCN XX9XX items require inordinate amounts of time from our classification specialists even though they only apply to Syria and Sudan. There has been no realistic attempt to analyze whether those older controls have any meaning as applied to such countries; they seem simply to be unthinking holdovers never to be considered seriously again. They take up an increasing portion of the CCL.

We are more concerned that the U.S. is apparently considering retaining current unilateral controls on Eastern European countries and the PRC when the Wassenaar Arrangement national security controls are implemented. The letters referenced at the outset of our 1995 comments and

many important studies have demonstrated clearly why unilateral export controls are generally ineffective other than to distance the United States from an offensive nation. We understand that the PECSEA and others are preparing a more detailed submission on this point. While such distancing may be a laudable symbolic goal, it seriously undercuts U.S. competitiveness and imposes a substantial price in terms of an economic drag on the U.S. economy. We hope that your analysis will in fact closely examine and analyze the impact of unilateral U.S. export controls. With the data that you generate, U.S. policy makers will have a more informed bases for which to eliminate them and fulfill the promises made in the TPCC Report of 1993.

CONCLUSION

Thank you for the opportunity to provide these comments and in advance for considering them. If you have any questions regarding the foregoing ideas, please call the undersigned.

Sincerely,

Hans Luemers /BF

Hans Luemers
Manager Corporate Export Control

BHF/HL/

Regulations and Procedures Technical Advisory Committee
Washington, D.C.

November 15, 1996

Honorable Sue E. Eckert
Assistant Secretary for Export
Administration
Bureau of Export Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

RE: Foreign Policy Comments Pursuant to Federal Register Notice, 61 Fed. Reg. 51395 (October 2, 1996)

Dear Ms. Eckert:

Pursuant to the Bureau of Export Administration's request, the Regulations and Procedures Technical Advisory Committee ("RPTAC") provides the following comments to the October 2, 1996 Federal Register notice: "Request for Comments on the Effects of Foreign Policy-Based Export Controls." 61 Fed. Reg. 51395 (October 2, 1996). These comments present the RPTAC's general view on unilateral foreign policy-based controls, as well as specific instances where those controls merit further substantive review and modification. Although the RPTAC presents these comments on behalf of the entire committee, the majority of the substantive comments were provided by Mr. William Root, Mr. Benjamin Flowe, Dr. Don Goldstein, Mr. James Andrews, and the undersigned.

The imposition of foreign policy controls is statutorily vested in the Executive Branch and is designed to achieve a variety of purposes. Because those controls are based on U.S. foreign policy interests and objectives, by their nature, they be unilateral in scope and limited in effect. The RPTAC understands and supports the Administration's authority to utilize foreign policy controls in those instances where controls appear to satisfy the statutory requirements for their imposition. **Even if imposed pursuant to a statutory mandate, however, those controls should be reexamined frequently, under a justifiable analytical framework, and balanced against the resultant, ever-changing, costs to the Government and U.S. industry to maintain the controls.** Industry is required to comply with these controls; it deserves to understand unambiguously the basis and scope of these controls. If the

Administration continues to impose foreign policy-based controls on dual-use commodities and technology, then the RPTAC suggests that the purpose of the controls - *i.e.*, antiterrorism, "distancing from abhorrent acts or actors" - be clearly defined in resulting Federal Register notices and the Export Administration Regulations ("EAR").

SPECIFIC COMMENTS

A. Economic Security

The RPTAC endorses the conclusions of the President's Export Council ("PEC") provided in the Council's June 28, 1996 letter to the President discussing the adverse effect that unilateral sanctions have on the economic security of our nation. There is a need for a comprehensive assessment of such sanctions. Direct and indirect costs are especially severe from the U.S. extraterritorial controls and the U.S. Government, through the Departments of State and Commerce should support the broad bipartisan assessment proposed by the PEC. Commerce should survey the reactions of foreign governments, industries and trade groups to existing and emerging U.S. foreign policy export controls.

B. Criteria

The foreign policy request lists criteria to be considered in imposing or extending foreign policy controls. These derive from Section 6(b) of the expired Export Administration Act, now currently extended through the International Emergency Economic Powers Act. Reports in past years accompanying extension determinations have included numerous statements to the effect that foreign availability means that criteria concerning the effect of the controls on U.S. export performance and the ability of the United States to enforce controls are not being met. The criteria concerning achievement of the intended purposes are often met only by defining the purposes in such a manner that no other conclusion exists except to say that the criteria have been met. This is often done by stating that the purpose is merely to distance the United States from abhorrent acts or actors. Such a limited purpose, while appropriate in certain circumstances, is questionable and may be counter productive when friendly foreign governments openly refuse to follow the U.S. lead and offer competitive products. Also, it is very difficult to secure multilateral or even important bilateral support for controls that are primarily symbolic.

Existing procedures require decontrol of items controlled for national security purposes if there is a determination of foreign availability, unless the President issues a

national security override. One of the principal objectives of foreign policy is to further national security.

RPTAC Recommendations

1. The intended purpose of foreign policy controls should be more than to "distance the United States from an abhorrent act or actor."

2. A finding of foreign availability should mandate the revision of foreign policy controls, absent a Presidential foreign policy override.

C. Extraterritoriality

Secondary boycotts, such as those recently enacted against Cuba, Iran, and Libya are potentially detrimental to U.S. industry competitiveness and performance. Allied nations strongly oppose such extraterritorial measures to such a degree that several of the United States' closest allies have enacted "blocking" statutes to preclude the extraterritorial application of U.S. laws. (E.g., Canada, the United Kingdom, and the European Union). A high risk exists that substantial markets for U.S. exports to countries other than those targeted by the United States will be adversely affected by allied counter-measures. Such measures might be patterned on U.S. legislation which prohibits cooperation with secondary boycotts imposed by foreign governments. In addition, issues involving the applicability of the World Trade Organization's ("WTO") trade preclusive restrictions calls into question the United States' continued ability to impose extraterritorial trade limitations on other sovereign nations without being challenged at the WTO.

Other friendly countries are also critical of extraterritorial U.S. reexport controls. Reexport controls have been waived for a few foreign-policy-controlled items but are in effect for most such items. Unfortunately in recent years the U.S. appears to be becoming less sensitive to the extraterritorial concerns of important allies whose support is vital to the battle against terrorism.

Further to this the RPTAC encourages the Departments to take note of the "Declaration" of the November 1996 Transatlantic Business Dialog (TABD) to the effect that "the present use of secondary boycotts and extraterritorial legislations is objectionable. The TABD urges the withdrawal of the extraterritorial provisions of U.S. Sanctions laws enacted in 1996."

RPTAC Recommendations

1. The United States shall refrain from implementing secondary boycotts.

2. The possibility of waiving reexport controls for additional items should be explored.

3. Reexport controls should be eliminated if a license is not required for the export of the same transaction directly from the United States (e.g., reexports are now controlled even though exports are not controlled for gifts, baggage, ship stores, and plane stores, per §§ 740.7(b), 740.10(b,c)).

4. U.S. controls on foreign-made items because of their U.S. content should be revised to apply only to the U.S. content.

D. Proliferation Controls

BXA noted a particular interest in the experience of exporters in complying with proliferation controls. U.S. exporters suffer competitive disadvantages because of the following unilateral aspects of the Commerce Control List ("CCL"):

1. International agreement on targeted countries does not exist.

2. No procedure exists for review by these regimes before exports are approved by member governments to any country.

3. It is unlikely that procedures designed to avoid another member from undermining U.S. denials will be effective. Moreover, there appear to be no formal, uniform procedures for not undercutting the denial decisions of other members in the nonproliferation and Wassenaar regimes. Looking back, allies undercut U.S. denials of a steel mill and an aluminum smelter to the Soviet Union following the Soviet invasion of Afghanistan, arguing that their exports, although substantially the same as what the United States denied, differed in minor respects. There remains a healthy skepticism that allied governments whose laws guarantee

the right to export will not follow the U.S. lead particularly in instances where the U.S. denials relate to parties indirectly or marginally involved with sensitive programs.

4. "Catch-all" controls on unlisted items to known proliferators are broader than those of other regime members. (See also I. EPCI Catch-All which follows.)

5. Many U.S. controls said to be based on multilaterally-agreed listed items are broader than the multilateral descriptions themselves (e.g., missile and nuclear-related computer controls, software for missile-related items, technology for chemical and biological ("CB") items, and overly broad descriptions of the portions of items controlled by one regime also controlled by another regime).

6. The U.S continues to maintain unilateral controls for nuclear nonproliferation even though Nuclear Suppliers Group member countries have not agreed to do the same. These U.S. unilateral controls are ineffective as the items controlled are readily available from foreign sources without license requirements. In order to keep up with project schedules and reduce burdens on the work process, U.S. companies are abandoning U.S. suppliers and sourcing these items outside the U.S.

7. The U.S. applies a cross-over licensing policy under which it may deny an application for the export, for example, of a nuclear controlled item to an entity involved in a military program in a country such as China. Other regime members typically limit license considerations to the guidelines under the relevant control regime. As a result other members are known to have ignored U.S. requests not to undercut such denials, which results in a unilateral U.S. control *in effect*.

The intended coverage of CCL missile-related software controls and all the CB-related technology controls is particularly ambiguous. The only nexus word in these items describing applicability to items to which the software or technology is related is "for" (omitting phrases used for other software and technology items such as "specifically designed" or "according to the General Technology Note"). Such ambiguity can be costly to exporters, either because they lose sales by interpreting

coverage more broadly than intended or because they could be charged as violators if they interpret coverage less broadly than intended.

There are also items on the Commerce Control List which concurrently appear on the State Department U.S. Munitions List, such as biological agents, CBW detection equipment, and gyro-astro compasses.

RPTAC Recommendations

1. The United States should continue to seek more discipline in multilateral regimes.

2. "Inadvertent" unilateral and unilateral controls *in effect* should be removed. (By way of example see the attached discussion of a possible unilateral U.S. nuclear control of certain pipe, fittings and valves under ECCN 2A292.)

3. Ambiguity in controls e.g. missile-related software and CB-related technology controls, should be removed.

4. The United States should support efforts to rationalize the numbering and content of items which overlap among the proliferation regimes and the evolving Wassenaar Arrangement.

5. State and Commerce regulations each should be revised to provide that, if a license is obtained from one Department, a second license is not required from the other Department for the same transaction.

E. Parts and Components

BXA also noted an interest in the effects of controls on exports of replacement and other parts. U.S. reexport controls have, over the years, led foreign importers to engineer U.S. components out of their products in order to avoid U.S. controls which would restrict their exports.

The de minimis rules adopted in the 1980's removing minimal U.S. content in foreign items from U.S. jurisdiction have lessened, but not removed, this problem. Recently-revised regulations have left ambiguous whether, as in the old regulations, a U.S. license is required only if the foreign-made item with U.S. content would require a

license if exported from the United States. There is ambiguity as to the extent to which controls apply to general purpose parts and components. Also, evidence has surfaced that ambiguity in recent sanctions legislation coupled with the threat in the waning stages of the last Congress of removal of de minimis for U.S. components in foreign products to be exported to terrorist countries is again causing foreign multinationals to reevaluate purchasing U.S. components when foreign options exist. Antiterrorism controls also damage the reputation of U.S. suppliers by denying even the replacement of defective U.S. - origin items. See § 740.5(b)(3)(i).

RPTAC Recommendations

1. To avoid a general engineering out of its components the U.S. must resist elimination of de minimus provisions for terrorist countries.

2. U.S. exporters and foreign reexporters should be permitted to replace defective items, legally exported, wherever they are located.

3. Remove regulatory ambiguities.

F. De Minimis Reporting

The regulations now permit export without a U.S. license of de minimis U.S. content in a foreign item. However, before any U.S.-origin software or technology is exported under this rule, a report must be sent to the U.S. Government describing how the U.S.-origin percentage was calculated.

If U.S. content is minimal, few foreign exporters will ever think to file a report to prove that U.S. controls do not apply. But an export of commingled software or technology would constitute a violation of U.S. law for failure to file the mandated report, even if the U.S. content were minimal, no matter what method was used to make the calculation.

The apparent violator would be the foreign reexporter of the U.S. content. But U.S. enforcers might hold the original U.S. exporter liable for not taking adequate precautions to prevent reexport. The relevant precaution stipulated in the regulations is a Destination Control Statement which includes the following: "Diversion contrary to U.S. law prohibited."

It is reasonable for the Government to have the opportunity to review the calculation methodology when the U.S. content percentage is close to the regulatory

limit. However, the regulations should not result in a violation simply for a procedural failure to file a report prior to a transaction of not substantive concern.

RPTAC Recommendations

1. The mandatory report should be changed to a voluntary procedure which triggers a "safe harbor" for those who do file.

2. Persons exporting commingled software or technology without filing a prior report should bear the burden of proving in an enforcement case that their software or technology does not exceed the applicable de minimis limit.

3. The U.S. exporter of U.S. content in a foreign item should not be held liable for the failure of the foreign person to comply with U.S. regulations, provided that the original export from the United States was accompanied by the Destination Control Statement specified in the regulations, satisfied all applicable export requirements, and no collusion, conspiracy or other unlawful action occurred to evade the controls.

G. Anti-Terrorism

A substantial number of the items currently controlled for anti-terrorism purposes were put on the terrorism list simply because they had become obsolete in terms of security export controls and there was a reluctance to "liberalize" controls to terrorist-supporting countries when license requirements were removed for other destinations. Other items on the terrorism list were added over time to address a country specific behavior although they had little, if any, relationship to terrorism.

Frequently put in place quickly in response to a particular foreign action, antiterrorism controls can have unintended results. For example, the March 25, 1996, regulatory revision has even undermined the general license for aircraft on temporary sojourn destined for Cuba, Libya, or North Korea, by removing fuel from the items which can be supplied to such aircraft.

Also, a large number of items subject to antiterrorism controls have general descriptions unrelated to specific control categories. All technology items and category

5 software items controlled only to terrorist-supporting countries are ambiguous, because of using only the word "for" to describe applicability to items to which the technology or software is related. The lack of clarity in these controls make enforcement difficult and can result in unintentional violations by responsible exporters.

RPTAC Recommendations

1. The terrorist control list applicable to all terrorist supporting countries should be updated to focus on items that clearly contribute to international terrorism. Items put on the control list to penalize a particular country should be removed when the terrorist posture or control status of the country changes.

2. The terrorism controls that may have unintended consequences i.e. fuel for aircraft on temporary sojourn should be should be reviewed and unintended results redressed.

3. Ambiguous list entries, technology and software controls should be claried, and removed when deemed appropriate.

4. Extraterritorial controls justifiable solely for distancing or symbolic reasons should be reevaluated.

H. Regional Stability and Munitions Production

Ambiguity concerning controls on items to produce munitions constitutes a potentially serious foreign policy control embarrassment for both the U.S. Government and U.S. exporters.

Relevant U.S. regulations fail to define "specially designed" for non-missile-related items or to provide adequate guidance to interpret U.S. munitions production controls. Substantial, and probably inadvertent, differences exist between U.S. texts and multilaterally-agreed texts relevant to munitions production.

RPTAC Recommendations

1. Commerce should clarify intended controls on munitions production.

2. Commerce should negotiate harmonized controls in this area with its allies.

3. "Specially designed" when used for other than defined missile technology (MT) purposes should be mean either "unique" (MT definition) or "peculiarly responsible for achieving" embargoed specifications.

I. EPCI Catch-All

The U.S. Enhanced Proliferation Control Initiative (EPCI) "catch-all" control is creating significant problems for exporters. As far back as its 1993 Trade Promotion Coordinating Committee Report the Administration recognized the need to clarify the knowledge standard and narrow the scope of the controls. For nearly two years a Department of Commerce proposed solution has languished in the National Security Council awaiting resolution of unresolved differences among the concerned agencies. In 1995 the European Community acceded to a U.S. initiative to adopt a catch-all control regulation; yet the majority of EC countries have not implemented in national regulations functional catch-all controls as they wait on the U.S. to act.

With the narrowing of the various multilateral control lists, a functioning, enforceable catch-all control assumes greater importance in effectively combating the proliferation of weapons of mass destruction. In its letter dated July 31, 1996 to Secretary Kantor (copy attached and incorporated by reference) the RPTAC reiterated a number of recommendations for "focusing" the nuclear catch-all provisions and "fixing" the flawed "is informed" process through which exporters are alerted to sensitive facilities or diversion risk companies and entities.

As implemented in the U.S., catch-all compliance entails a costly burden on exporters, including those whose exports could make no significant contribution to weapons proliferation, or who export predominantly to countries of no proliferation concern to the U.S. Government. The U.S. regulations and practices are generally broader than those of other countries. They tend to discriminate against exporters who either 1) take their obligations more seriously than less vigilant or knowledgeable competitors, or 2) who may not be similarly "informed." Because the U.S. has not settled on a reasonable way of sharing even unclassified information with exporters on countries or projects or facilities involved with WMD programs, inadvertent transfers inevitably continue from the U.S. and abroad.

There have been few enforcement actions in the U.S. or abroad under the catch-all controls. U.S. enforcement personnel and agencies concede they have no intention of pursuing enforcement actions on items having no significance to WMD programs. Export control officials in countries where exporting is not just a privilege question their ability to deny exports of unlisted products even to countries of concern. Further multilateral discussions are clearly required in order to make catch-all a viable control.

RPTAC Recommendations

1. The "catch-all" rule should be limited to instances where the exporter "is informed" by the Government that all items require a license to a named end-user.

2. The Government should inform, wherever possible, all exporters if one exporter "is informed". In rare instances where publication can compromise intelligence sources, alternative method for informing appropriate exporters should be explored. (Most high technology companies have personnel with top secret or higher clearances or Agency contacts who could place a hold on exports to specified parties.)

3. The U.S. Government's list of "known" sensitive nuclear facilities and safeguarded and unsafeguarded fuel cycle facilities should be published in a form usable by U.S. industry.

4. If limiting "catch-all" to "is informed" is not feasible, then Commerce should:

   a. require a license only if an exporter "knows" that the item will be "directly employed" in, and make a "material contribution" to, specified proliferation activities;

   b. narrow the nuclear license requirement to the "D:2" or other appropriate list of countries of nuclear concern;

   c. establish deadlines for Government response to exporter questions concerning questionable end-

users, similar to those in effect for license processing; and

d. subject continuation of these controls to a rigorous review based on an in-depth study of the factors specified in section 6(f) of the EAA.

CONCLUSION

We appreciate the opportunity to provide these general and substantive comments regarding the foreign policy-based controls. The RPTAC is prepared to work closely with the Department of Commerce to achieve important U.S. Government objectives without needlessly and haphazardly injuring U.S. economic security interests deriving from a strong and healthy industrial base. Please contact Mr. Seppa or the undersigned to discuss these comments if you have any questions.

Cordially,

Richard M. Seppa
Chairman, RPTAC

RMS for
Giovanna M. Cinelli
Vice Chairman, RPTAC

cc: Honorable Iain Baird
RPTAC Industry Members

Attachments

Attachment

Items falling under ECCN 2A292 on the Commerce Control List are subject to nuclear nonproliferation controls (i.e., the Nuclear Referral List -- "NRL"). NRL items are defined as those "that could be of significance for nuclear explosive purposes if used for activities other than those authorized at the time of export."

The types of pipe, fittings, and valves covered under ECCN 2A292 are those that are used in many commercial process plants and refineries around the world.

In April 1992, the U.S. announced that Nuclear Suppliers Group ("NSG") had agreed on common exports controls of nuclear-related dual-use items that could make a major contribution to the development of nuclear weapons. The U.S. Government was unable to obtain NSG agreement to include items falling under ECCN 2A292 on the NSG list (Annex). **The U.S. decided to keep this entry on the Commerce Control List as a unilateral control despite the lack of multilateral support then and now.**

Currently, items falling under U.S. Commerce Control List ECCN 2A292 require a license for export to any country that is not a member of the NSG.

Industry supports efforts by the U.S. Government to curtail the spread of nuclear weapons production. However, a unilateral control on pipe, fittings, and valves covered under ECCN 2A292 is: 1) ineffective in preventing spread of nuclear weapons; and 2) harmful to U. S. suppliers.

No other NGS member or other country controls these types of pipe, fittings, and valves for commercial use. If a foreign entity wants to obtain these items, they can do so without an export license from any source other than the United States. For firms that do a large amount of international business in the area of commercial plants, the requirement to obtain an export license for every pipe, fitting and valve falling under 2A292 is an immense burden on the work process. While this type of equipment can be fabricated quickly (sometimes pulled off the shelf), export license applications cause a major slowdown in the work process as such licenses are referred to the interagency process for approval. Oftentimes, U.S. industry determines it is better to source outside the U.S. to avoid the export license requirement and to meet project schedules.

In addition, most U.S. suppliers of these types of pipe, fittings, and valves are not aware of this export regulation and are not able to readily supply exporters with the appropriate export licensing information. Firms who are in the business of building

commercial plants overseas, are forced to calculate technical parameters costing money and further delay.

Tektronix, Inc.
P. O. Box 500
Beaverton, Oregon 97077-0001
503 627-7111

Tektronix

July 31, 1996

The Honorable Michael Kantor
Secretary of Commerce
Washington, DC

Dear Secretary Kantor:

We are writing on behalf of the Department of Commerce's (DOC) Regulations and Procedures Technical Advisory Committee (RPTAC) to strongly endorse Michael Jordan's letter of May 20 on behalf of the President's Export Council Subcommittee on Export Administration (PECSEA). In it he called for changes to the Enhanced Proliferation Control Initiative (EPCI) regulations.

As far back as 1993, the Clinton Administration recognized problems existed with the implementation of the so-called proliferation "catch-all" controls. The Administration committed in its Trade Promotion Coordinating Committee (TPCC) Report to clarify the knowledge standard and narrow the scope of the controls. Unfortunately, due to strong disagreements among the agencies, the "fixes" proposed by DOC have been allowed to languish for many months. In an effort to re-energize the process, DOC arranged a meeting between the agencies and the RPTAC as well as the PECSEA in November, 1995. These discussions helped to clarify the respective positions of the agencies and to air industry's concerns with the rules. However, despite repeated promises for action, the matter still remains stalled at the National Security Council (NSC).

Among the most urgently needed changes are the following:

1. **Limit the nuclear catch-all controls** to the ten or so most sensitive countries which are known to have *unsafeguarded* nuclear fuel cycle and explosive programs or which pose a significant diversion risk. Exporters would then only have to screen transactions intended for final destination to these countries rather than the current requirement to screen every country in the world except 17. For example, the list could include: India, Iran, Iraq, Israel, Libya, North Korea, Pakistan, Syria and the United Arab Emerites.

2. **Narrow the scope of EPCI by *excluding* from its application off-the-shelf, general purpose, dual use products; narrow the "catch-all" rule by changing it into a "catch-what matters" approach.** Many believe that the best mechanism for limiting the scope of EPCI would be to publish a "positive list" of items which are thought to be able to make a material contribution to weapons proliferation, as Japan has now done and the European Union (EU) is rumored to be considering. Such items would be identified within the current Commerce Control List (CCL) as unilateral controls (ECCNs xx9xx) -- similar to what used to be known as "F" level items. Inclusion of items within these newly created ECCNs *would not* automatically require a validated license, but *would* require an exporter to scrutinize and question the transaction when shipping to a "country of concern" for Chemical and Biological Weapons (CBW), missile or nuclear proliferation. Exporters shipping products not on the Commerce Control List would not have to conduct such screening. No reasonable official expects companies selling lumber, soda or other common commodities to screen against proliferation end-uses, but current rules makes them potentially liable for such sales.

A further suggestion relative to the nuclear catch-all would be to limit screening to items "specially designed or prepared" for nuclear sensitive activities. An example of specially designed and prepared items is the ring magnets which the Chinese supplied to Pakistan. According to nuclear experts within the Administration, companies producing "specially designed and prepared" items intended to be covered by the nuclear catch-all will know it by virtue of having sold into activities covered by Export Administration Regulations (EAR) Section 744.2 and 744.6(a)(1)(i)(A).

3. **Fix the "is informed" process which is badly flawed.** Currently, an exporter can be notified in a variety of ways that the foreign entity with which it is proposing to sell is an unacceptable recipient of U.S. products. Examples of being "informed" are: a denied export license, a negative reply to an advisory opinion, a phone call from the Deputy Assistant Secretary which in turn is followed by a certified letter within 48 hours, or letters being sent to a small subset of the exporting public (e.g., 150 Distribution License holders being sent Indian Space Resources Organization "informed" letters). The biggest problem with this piecemeal approach has been the lack of fairness. Competitors of informed U.S. exporters are rarely likewise notified that they should not sell similar (or sometimes even identical) products. The previous National Security Advisor to then President Bush, Brent Scowcroft, promised that this flaw of EPCI would be remedied in the spring of 1992. Informed U.S. exporters deserve, at a minimum, a level playing field with their domestic competitors. Besides the level playing field argument, failure to inform more systematically means many U.S. exporters may be inadvertently conducting business with entities they do not know are involved in proliferation activities. We anticipate validated licenses would be required for transactions with entities identified under the informed process.

We also strongly recommend that the Government utilize the available supplements in the EAR to publish entities known to be involved in or diverting to proliferation activities in the narrow band of countries of concern. To minimize due process concerns, the regulations would make clear that all exports to such entities do not automatically require a license, but that these entities have been known to be engaged in activities of proliferation concern. Thus, exporters would be expected to screen shipments to the entities to avoid being liable for knowingly contributing to such end-uses.

Exporters would be further aided if the Government would also publish, from unclassified sources such as the International Atomic Energy Agency (IAEA), the names of safeguarded or unsafeguarded nuclear fuel cycle or explosive programs in the nuclear sensitive countries. It is unreasonable to burden exporters with liability for exporting items to "unsafeguarded facilities" while not providing exporters with available information as to what facilities are unsafeguarded. For the same reason, the Government should publish more comprehensive lists of known missile and CBW projects and facilities in countries of concern, as originally contemplated by Supplement 7 to Section 744 of the old EAR.

Thank you for considering our views. We would welcome any opportunity to discuss these recommendations further.

Sincerely yours,

Richard Seppa
Chair, RPTAC

cc: The Honorable Anthony Lake
The Honorable Laura D. Tyson
Undersecretary Bill Reinsch

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